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JOHN F. DAVIS, CLE[illegible]

IN THE

Supreme Court of the United States

October Term, 1964.

No. [redacted]6. 6

AL HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

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INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	2
Statement	3
Summary of Argument	8
Argument	9
I. The Petitioner Was Deprived of His Fundamental Right to Hearing on Notice When No Countervailing Need for Haste or to Preserve the Dignity and Respect of the Court Appears Since There Was No Such Open Threat to Orderly Procedure as to Justify Instant Punishment	9
II. The Court Should Not Have Sentenced Petitioner to One Year's Imprisonment for Criminal Contempt Without a Jury Trial	12
III. Petitioner's Sentence of One Year's Imprisonment for Criminal Contempt Without a Trial by Jury Is Constitutionally Excessive	15
Conclusion	17
Appendix	A1

CITATIONS.

Cases:	Page
Anderson v. Dunn, 6 Wheat. 204, 231	9
Brown v. United States, 359 U. S. 41	8, 10, 11
Burnet v. Coronado Oil & Cas. Co., 285 U. S. 393	13
Cammer v. United States, 350 U. S. 399	9
Cooke v. United States, 267 U. S. 517	10, 14
District of Columbia v. Clawans, 300 U. S. 617	8
Ex parte Terry, 128 U. S. 289	14
Gideon v. Wainwright, 372 U. S. 335	13
Gompers v. United States, 233 U. S. 604	14
Green v. United States, 356 U. S. 165	12
In re Michael, 326 U. S. 224	14
In re Oliver, 333 U. S. 257	9, 14, 15
In re Savin, 131 U. S. 267	14
Levine v. United States, 362 U. S. 610	14
Mapp v. Ohio, 367 U. S. 643	13
Marcus v. United States, 310 F. 2d 143, cert. denied, 372 U. S. 944	10
McNabb v. United States, 318 U. S. 332	14
Nye v. United States, 313 U. S. 33	9, 14
Offutt v. United States, 348 U. S. 11	9, 11, 14
Panico v. United States, 375 U. S. 1	9, 15
Randazzo v. United States, 339 F. 2d 79	16
Rollerson v. United States, — F. 2d — (D. C. Cir. October 1, 1964)	16
Toledo Newspaper Co. v. United States, 247 U. S. 402	14
United States v. Barnett, 376 U. S. 681	7, 8, 12, 15, 17
United States v. Fleischman, 339 U. S. 349	14
United States v. Shipp, 214 U. S. 386, and 215 U. S. 580	13

CITATIONS (Continued).

Constitution, Statutes and Rules: Page

Constitution of the United States:
- Article III, Section 2 ..... 8, 13
- Fifth Amendment 8
- Sixth Amendment 8, 13, 14

18 U. S. C. § 1 15
18 U. S. C. § 371 3
18 U. S. C. § 401(1) 9
18 U. S. C. § 401(3) 9
18 U. S. C. § 7203 16
28 U. S.C. § 1254(1) 1
47 U. S. C. § 203(c) 3
47 U. S. C. § 409(l) 3, 4
47 U. S. C. § 501 3
Federal Rules of Criminal Procedure:
- Rule 1 11
- Rule 2 11
- Rule 7(a) 8, 11, 15
- Rule 32(a) 11
- Rule 42(a) 2, 6, 7, 9, 11
- Rule 42(b) 8, 9, 10, 11, 15

Miscellaneous:

Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in Inferior Federal Courts, 37 Harv. L. Rev. 1010 ..... 9, 14

Goldfarb, The Contempt Power, 106-109 10

Jury Trial for Criminal Contempts: Restoring Criminal Contempt Power and Protecting Defendant's Rights, 65 Yale L. J. 846 14

Tefft, United States v. Barnett: " 'Twas A Famous Victory", in The Supreme Court Review—1964, 123 16

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AL HARRIS,

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UNITED STATES OF AMERICA,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the court of appeals (R. 72-77) is reported at 334 F. 2d 460.

JURISDICTION.

The judgment of the court of appeals was entered on July 22, 1964 (R. 77-78). A petition for rehearing was denied on August 25, 1964. The petition for a writ of certiorari was filed on September 22, 1964, and certiorari was granted on December 14, 1964. The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The order granting the writ of certiorari (R. 82) limited the questions for consideration to Questions 2, 3 and 4 presented by the petition. These are renumbered:

1. Whether petitioner was offered a proper and fair hearing for criminal contempt under Rule 42(a), F. R. Crim. P., and whether *Brown v. United States,* 359 U. S. 41, should be reconsidered and overruled by this Court.

2. Whether petitioner should have been granted a trial by jury on the charge of criminal contempt where he has been sentenced to one year's imprisonment.

3. Whether the sentence of one year's imprisonment imposed against petitioner in a summary contempt proceding is constitutionally permissible.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The pertinent constitutional provisions, statutes, and rules are set forth in the Appendix, *infra,* pp. A1-A7.

STATEMENT.

The petitioner was summarily sentenced to one year's imprisonment for criminal contempt for his refusal to answer certain questions that the court ordered him to answer after he had refused to answer the same questions before a grand jury in the Southern District of New York.

Petitioner first came before the grand jury on July 31, 1963, in compliance with a subpoena which referred only to the general conspiracy statute, 18 U. S. C. § 371. He refused to answer questions propounded to him that day on the ground of privilege, having first stated that he would like to have counsel (R. 66). He was brought, with the grand jury, before District Judge McLean (R. 61), who continued the proceeding to the next day, so that petitioner could obtain counsel (R. 64). At that time (R. 62) and on the next day (R. 48), when petitioner appeared with temporary counsel, the government maintained that asking a question of the petitioner concerning another individual who made a legitimate telephone call to lease premises entitled the government to insist upon an answer under the immunity provisions of the Federal Communications Act, 47 U. S. C. 409(l). The court refused to order petitioner to answer the questions because it was not satisfied that the grand jury was engaged in an investigation involving the Communications Act, and that no such investigation was made apparent by the questions put to petitioner (R. 57).

Thereafter, in compliance with a new subpoena, which referred to 47 U. S. C. § 203(c) and § 501, petitioner appeared before the grand jury on August 7, 1963 (R. 17), and declined to answer certain questions on the ground of privilege, although he was told by government counsel that "the Grand Jury, after you invoke your privilege against self-incrimination, may direct you to answer questions, and by so doing, grant you immunity" under 47 U. S. C. § 409(l) (R. 18-21).

Promptly thereafter, the petitioner and the grand jury appeared before Judge McLean. This was within the grand jury proceeding and regarded as secret, although petitioner's counsel was present (R. 23). Petitioner's counsel explained his position in this new proceeding: that petitioner was without funds, that counsel was appearing on short notice, and that the matter should be continued so that counsel could be retained (R. 4-5). At the request of the court, counsel remained to represent petitioner because the court did not wish to delay (R. 6-7). The government proceeded with its request for assistance of the court to the grand jury (R. 4-5), asserting that by reason of 47 U. S. C. § 409(l), petitioner was granted immunity and should be informed that he did not have a privilege to refuse to answer. After some discussion, the matter was adjourned to the next day, the court requesting petitioner's counsel to "stay in that long" (R. 16). The court did not regard the matter as a contempt proceeding at that time (R. 16) and counsel for petitioner indicated that he did not wish to remain in the case if there was a contempt proceeding.

On the following day, August 8, Judge McLean and all parties together with the grand jury, assembled. Judge McLean did not regard the matter as a contempt proceeding (R. 23). He directed the petitioner to answer the questions before the grand jury, and he and counsel for petitioner retired from the room (R. 24).

Petitioner declined to answer the questions he was directed to answer by Judge McLean. The Judge and petitioner's counsel re-entered the room. After the transcript of the grand jury proceeding was read, the government counsel requested the court "to direct this witness once again to answer the questions that were put to him" (R. 30). Thereupon, petitioner was sworn, and the court repeated to him the questions[1] and directed him to answer, but petitioner refused on the ground of privilege (R. 30-32).

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1. The questions, seriatum, are:

Do you know of a phone call made by John Manarite around January or early February of this year from Miami, Florida to

Government counsel then requested that petitioner be found in contempt of court "under Rule 42(a)." Counsel for petitioner protested, and requested adjournment and a public hearing where he would be permitted to call witnesses. The court denied the request, adjudged petitioner guilty of criminal contempt and imposed the sentence of one year's imprisonment.[2]

Flushing, New York in connection with the leasing of a premises in Ojus, Florida for the purpose of a dice game?

Do you know whether or not Mr. Manarite used a pay telephone?

Do you know whether or not he used a private premises to make that telephone call?

Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call?

Do you know whom Mr. Manarite was working for or in partnership with in connection with the leasing of these premises that he talked about in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?

Do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or partnership with one Carmine Tramunti?

Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ of or in partners with Mr. Thomas Luchese?

Mr. Harris, I ask you, do you know any of the person or persons who were the employers or partners of Mr. Manarite at the time of the telephone call in question?

In connection with this phone call, were you a partner in the operation of the dice game at the premises in Ojus, Florida?

Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?

2. The following transpired (R. 32-33):

[by the court]: Do you still refuse Mr. Harris?

The Witness: I respectfully refuse to answer on the grounds that it would tend to incriminate me.

The Court: Anything further?

[government counsel]: No, your Honor, I think the record speaks for itself, and I would ask your Honor to find this witness in contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure.

[petitioner's counsel]: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the min-

The court admitted the petitioner to bail, recognizing that the issues raised were not frivolous (R. 35).

On August 9, 1963, Judge McLean filed a certificate in accordance with Rule 42(a), F. R. Crim. P. (R. 39-40). The certificate recites, *inter alia*, that petitioner failed to state any valid reason why he should not be held in contempt. The record discloses that the court did not ask the petitioner to make a statement before sentence.

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utes and I want to have an opportunity to discuss them and consider with my client and to look up the law.

I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.

I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

I also would request that the contempt hearing be held in public.

The Court: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42(a).

This procedure has been followed, as you know, in certain other cases on this subject, and in view of the witness' attitude he is obviously taking a position for the purpose of making a record which he has a perfect right to take. But I have directed him to answer, and he has refused to answer, and that constitutes contempt in the presence of the Court. I see no reason for any further hearing.

[petitioner's counsel]: Or a hearing on contempt open to the public?

The Court: This is open to the public.

[petitioner's counsel]: This room has been sealed.

The Court: No, this room is not sealed. This is a session of the United States District Court. We opened this court a few minutes ago before we began this proceeding. It is a completely open proceeding.

Now, when I said Mr. Harris had a right to take this position, obviously I am not indicating that I agree with him, but I understand that what he is doing is taking a position so that he can raise a question on appeal. And he has a legal right to preserve his position and raise that question.

I judge Mr. Harris guilty of contempt of court, and I sentence him to imprisonment for a term of one year.

The court of appeals affirmed petitioner's conviction and sentence. It stated that this Court's statement in a footnote to *United States v. Barnett*, 376 U. S. 681, 694-695, n. 12, was *dictum*. It further stated that the instant case was distinguished from *United States v. Barnett, supra*, inasmuch as petitioner's contempt was committed in the presence of the court, and the contempt proceeding was undertaken prior to compliance with the court's order (R. 77).

The petition for a writ of certiorari was not opposed by the government with respect to the question, whether the district court could proceed under Rule 42(a), F. R. Crim. P., to try petitioner for contempt and sentence him for imprisonment for one year.

SUMMARY OF ARGUMENT.

1. Petitioner did not have a proper and fair hearing before he was convicted and sentenced. If a contempt of court was committed, the offense occurred when petitioner violated the direction, first given, to appear before the grand jury and answer the questions involved. Thereafter, the court was simply employing a "procedure" that avoids compliance with Rule 42(b). To the extent that *Brown v. United States,* 359 U. S. 41, sanctions such "procedure," it should be overruled.

2. Petitioner was entitled to a jury trial under the provisions of Article III, Section 2 of the Constitution and under the Fifth and Sixth Amendments and a prosecution by information or indictment under Rule 7(a), F. R. Crim. P., before he could be sentenced to a term of imprisonment for one year. In addition, this Court has the power and authority to so declare by virtue of its function as the final arbiter of proper administration of justice in the federal courts. The severity of the sentence, imprisonment for one year, imports a crime which is not punishable except in accordance with the dictates of the Constitution. *District of Columbia v. Clawans,* 300 U. S. 617.

3. The district court was without authority to sentence petitioner for criminal contempt, summarily, to a term of imprisonment in excess of six months. This limitation is derived from the fact that punishment upon summary trial is constitutionally limited to that penalty provided for petty offenses. *United States v. Barnett,* 376 U. S. 681, 694-695, n. 12.

ARGUMENT.

I. The Petitioner Was Deprived of His Fundamental Right to Hearing on Notice When No Countervailing Need for Haste or to Preserve the Dignity and Respect of the Court Appears Since There Was No Such Open Threat to Orderly Procedure as to Justify Instant Punishment.

The general procedure for the handling of criminal contempts of court is set forth in Rule 42(b), Federal Rules of Criminal Procedure (*infra*, p. A6), which is stated in mandatory terms. Rule 42(a) is expressly described as an exception, and is in permissive terms. Certainly the distinguishing factor between the application of Rule 42(a) and the application of Rule 42(b) is not whether the event occurred in the presence of the court. *Cf. Panico v. United States*, 375 U. S. 29.

The particular exceptional circumstances which seem most eligible for the precipitous procedure of Rule 42(a) are those of a kind characterized by in 18 U. S. C. § 401(1) (*infra*, p. A2) as misbehavior disruptive of court proceedings or the conduct of its business.[3] Such construction is historically consistent with due concern for controlled usage of the contempt power. See, *Cammer v. United States*, 350 U. S. 399; *Offutt v. United States*, 348 U. S. 11; *Nye v. United States*, 313 U. S. 33. Indeed, the limits of the power to punish for contempt are "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat. 204, 231. See also Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in Inferior Federal Courts*, 37 Harv. L. Rev. 1010.

This Court has recognized that the power to impose punishment for criminal contempt without notice or hearing is capable of grave abuses. *In re Oliver*, 333 U. S. 257,

3. Rule 42(a) does not expressly restrict itself to the category of contempts described in 18 U. S. C. § 401(1). However, the necessity for immediate action without regard to the minimal protections afforded by Rule 42(b) in order to preserve order and decorum, is more readily apparent than as to the conduct described in § 401(3).

274. Certainly the instant case, or indeed any case bottomed on a refusal to answer questions before a grand jury is not an example of such open threat to orderly procedure that *instant* suppression and punishment was necessary, as distinguished from due and deliberate procedure. *Cooke v. United States,* 267 U. S. 517, 536.

If, as this Court indicated in *Brown v. United States,* 359 U. S. 41, 50, the objective of the district court, in following the procedure here adopted, was more intent upon aiding the grand jury than in punishing the witness, then it is pertinent to note first, that the contempt having been committed, nothing was to be gained by disregarding Rule 42(b) except the elimination of basic rights due any defendant for the mere sake of speed, albeit the delay attendant upon the observance of Rule 42(b) procedures would have been relatively slight. Second, the choice of the court was not between punishment or no punishment, but between *coercion* and procedures which might lead to punishment. *Marcus v. United States,* 310 F. 2d 143, cert. denied, 372 U. S. 944.[4] As the latter case shows, nothing is lost to the dignity of the court by compliance with Rule 42(b). Punishment without trial is not our democratic way of life or law.

In this case, on August 7, the government sought the aid of the court when petitioner refused to testify. The court, on August 8 directed petitioner to return before the grand jury and to answer the questions involved. Petitioner returned to the grand jury but refused to answer the questions. Promptly the government returned to the court, again to seek its assistance.[5] Not one word was said by government counsel at that time that he would

4. The denial of a basic right needs no other evidence of prejudice. Nevertheless, it may be noted that in *Marcus v. United States,* 310 F. 2d 143, cert. denied, 372 U. S. 944, where the asserted contempt was the refusal to testify, as here, the punishment after trial pursuant to Rule 42(b) was six months' imprisonment.

5. Goldfarb, in *The Contempt Power,* at 106-109, sets out in detail the ritual employed by courts to avoid giving the witness-defendant a hearing under Rule 42(b).

seek summary disposition under Rule 42(a). Not one word was said by the court that it regarded the proceeding as one for contempt. Only after the court put each question to petitioner and directed him to reply, which petitioner respectfully declined to do, did government counsel then request the court to find petitioner in contempt of court under Rule 42(a). Promptly the court not only adjudged petitioner guilty of criminal contempt, but imposed the sentence of one year's imprisonment.

The court noted that petitioner was making a record to test on appeal issues which it then regarded as not frivolous and granted bail. If the only result of the application of Rule 42(b) were to afford an opportunity for reflection, let alone an opportunity for counsel to subpoena witnesses, the reason for Rule 42(b) would be justified. Instead petitioner was summarily punished by a severe sentence, one year's imprisonment. See collection of cases noted in *Brown v. United States, supra,* 359 U. S., at 58-59, note 11 (dissenting opinion).

Petitioner submits that the precipitous procedure here employed was not necessary to uphold the dignity of the court. See *Offutt v. United States, supra.* There was no demonstrated need for speed, and indeed no resultant benefit. Petitioner, when he was brought into court the second time on August 8, had already violated a court order. The effect of the second "go-round" was to deprive him of his rights and the intangible benefits that flow from Rule 42(b), since having originally disobeyed the court's order there was no reason on this record to believe that he would answer the same questions because the court was now asking them, rather than the prosecutor. The procedures here adopted only serve to diminish the popular respect for courts and the law. In the exercise of its supervisory power over the administration of criminal justice in the federal courts, this Court can and should insist upon procedural regularity to foster that respect.[6]

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6. Insistence upon such safeguards is indicated in the Federal Rules of Criminal Procedure. Rules 1, 2, and 7(a), *infra,* p. A5.

The court failed to afford petitioner an opportunity to speak before imposing sentence. Rule 32(a), F. R. Crim. P., *infra,* p. A6.

Petitioner submits that he was entitled at the very least to an opportunity to prepare his defense, to present evidence, and to develop those matters which are pertinent to the offense, conviction and sentence, at a hearing that the public knew was open.[7]

II. The Court Should Not Have Sentenced Petitioner to One Year's Imprisonment for Criminal Contempt Without a Jury Trial.

Although he was sentenced to one year's imprisonment the petitioner in this case received no jury trial. Petitioner acknowledges that this Court has indicated, but not unanimously, that criminal contempt is not an offense which entitled the alleged contemnor to a jury trial as a matter of constitutional right. *United States v. Barnett,* 376 U. S. 681.[8]

Petitioner will not attempt to repeat the discourses of the dissenting Justices in *United States v. Barnett, supra,* at 725-726, and in *Green v. United States,* 356 U. S. 165, 193-219. They develop as soundly and persuasively as possible the proposition that criminal contempt is a crime which entitles the defendant to a trial by jury.

A majority of this Court concluded in *United States v. Barnett, supra,* that the power of courts to try criminal contempts existed as an exception to the constitutional

7. Opening a courtroom, which had been previously closed because the grand jury was in session, a few minutes before the contempt proceeding is not a public hearing, because the public would not know when it was to be opened after it had been sealed.

8. The Court answered in the negative the following question: "Where charges of criminal contempt have been initiated in this Court of Appeals against two individuals, asserting that such individuals willfully disobeyed a temporary restraining order of the Court, which order was entered at the request of the United States, acting as amicus curiae pursuant to its appointment by an order of the Court which granted to it, among other rights, the right to initiate proceedings for injunctive relief, and the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense under an Act of Congress, are such persons entitled, upon their demand, to a trial by jury for the criminal contempt with which they are charged?"

guarantees of a jury trial. But this conclusion did not rest on express or implied provisions of the Constitution. To the contrary, the Constitution is explicit, unambiguous and without exception insofar as a jury trial is here concerned. Section 2 of Article III and the Sixth Amendment of the Constitution. Rather, the conclusion was rested upon the view that the power of courts to try criminal contempts was unlimited at the time the Constitution was adopted and that such continued power was essential to preserve the efficiency and dignity of the courts.

However, the historical data upon which the majority of this Court relied only establishes the existence of the contempt power at the time the Constitution was adopted: it yields no evidence of the intention of the framers of the Constitution. We believe it pertinent to note here that, consistent with the concept of the Constitution as a living thing, the Court should re-examine the previously endorsed meaning of "criminal prosecution" in the Constitution.[9] *Cf. Gideon v. Wainwright,* 372 U. S. 335; *Mapp v. Ohio,* 367 U. S. 643.

The persistent proclamation of "self-restraint" as a limit upon the exercise of the contempt power so evident in the history of its application—and the historically recorded public recoil from believed judicial "abuses", which were indeed only examples of an extended use—of the contempt power, bespeak a concept of the contempt power at the time of the Constitution, and for a century and a quarter thereafter, substantially limited as compared to that evidenced by the more recent uses.[10] Certainly the most common applications of the power in the century and more following the adoption of the Constitution—as distinguished from the occasional exceptions—is more consistent with the

9. See, *Burnet v. Coronado Oil & Cas. Co.,* 285 U. S. 393, 405 (Brandeis, J., dissenting).

10. See, *e.g., United States v. Shipp,* 214 U. S. 386, and 215 U. S. 580, where this Court imposed sixty and ninety day sentences for the lynching of a prisoner in flagrant violation of its order that the custody of the prisoner remain in status quo pending review of his conviction.

conclusion that the contempt power was not without limit than the conclusion drawn by a majority of the Court, that the power is unlimited.[11] Indeed, unlimited exercise of the contempt power has not been conceded.[12] *Nye v. United States,* 313 U. S. 33, 49, and *In re Michael,* 326 U. S. 224, 227 (advocating restricted use to avoid contempt determinations of guilt without jury trial); *Offutt v. United States,* 348 U. S. 11. And the rumblings of discontent with the denial of a jury trial as an exception to the constitutional guarantee are not alone of recent vintage. See, *Toledo Newspaper Co. v. United States,* 247 U. S. 402, 425-426 (Holmes and Brandeis, JJ. dissenting: "[where] there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts.").[13]

Furthermore, the Court seems to assume that the necessity of power and its summary use are coextensive. It is submitted that the need for the contempt power does not justify summary use in all cases.[14] And, it is submitted

11. So here, this Court might also avoid the constitutional issues through the exercise of its supervisory powers over the administration of criminal justice in the federal courts. *Cf. McNabb v. United States,* 318 U. S. 332.

12. The criminal standard of proof, guilt beyond a reasonable doubt, applies to criminal contempts. See, *e.g., United States v. Fleischman,* 339 U. S. 349, 363; so also with Sixth Amendment or Due Process rights. *E.g., Cooke v. United States,* 267 U. S. 517, 534; *In re Savin,* 131 U. S. 267; *Ex parte Terry,* 128 U. S. 289; *In re Oliver,* 333 U. S. 257 (public hearing); *cf. Levine v. United States,* 362 U. S. 610.

13. In *Gompers v. United States,* 233 U. S. 604, 610-611, Justice Holmes stated: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure . . . and that at least in England it seems that they still may be and preferably are tried in that way." See also, Frankfurter and Landis, *Power to Regulate Contempts,* 37 Harv. L. Rev. 1010, 1042, 1046.

14. See, *Jury Trial for Criminal Contempts: Restoring Criminal Contempt Power and Protecting Defendant's Rights,* 65 Yale L. J. 846.

that the reasons justifying the power of the courts to initiate criminal contempt proceedings do not justify the denial of a jury trial in all cases.[15] See *In re Oliver*, 333 U. S. 257, 275. As there indicated, the most likely subjects for the exercise of the contempt power without jury trial are those who breach courtroom decorum, thereby requiring immediate action to prevent demoralization of the court's authority. But even here the protections of Rule 42(b) may be applicable. *Panico v. United States*, 375 U. S. 1.

The instant case is clearly not one which exemplifies the need for the application of summary contempt power without jury trial. The contempt in the presence of the court was in effect recreated by the court's action. Indeed, the district court recognized that there was no willful, improper, or evil motive behind the refusal to obey its command. Surely petitioner was entitled to the due deliberation of a jury to resolve the issue of guilt before being sentenced to one year's imprisonment.

The Constitution specifically excludes certain classes of cases from the protection of the grand jury. Contempt of court is not one of them. Significantly, Rule 7(a), F. R. Crim. P., at the very least, does not permit a prosecution for a term of imprisonment which may exceed one year for any criminal offense without an indictment.

III. Petitioner's Sentence of One Year's Imprisonment for Criminal Contempt Without a Trial by Jury Is Constitutionally Excessive.

It is the contention of petitioner that the district court was without constitutional power to impose upon him a sentence in excess of that provided for petty offenses.[16]

In *United States v. Barnett, supra*, 376 U. S., at 695 n. 12, this Court stated:

> "In view of the impending contempt hearing, effective administration of justice requires that this dictum be added: Some members of the Court are of the view that, without regard to the seriousness of the offense,

15. *Ibid.*, at 856-858.
16. 18 U. S. C. 1 (*infra*, p. A2).

> punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses."

In view of the dissenting opinions joined in by four Justices, petitioner believes that the statement of the Court quoted above reflects the opinion of a majority of the Court. In *Rollerson v. United States,* F. 2d (D. C. Cir. October 1, 1964), the court of appeals stated:

> "Since Rollerson's contempt conviction, a majority of the Supreme Court has indicated in United States v. Barnett, 376 U. S. 681 (1964), that the punishment which may be imposed after a non-jury contempt conviction is limited to that provided for petty offenses."

See also, *Randazzo v. United States,* 339 F. 2d 79, 81, a decision of the court of appeals for the Fifth Circuit.

The court below regarded Footnote 12 as *dictum.* It also said that the *dictum* was inapplicable because petitioner's contempt was committed in the presence of the court and the contempt proceeding was undertaken prior to compliance with the district court's order, in both of which respects the instant case differs from *Barnett.*

Although Footnote 12 is denominated *dictum,* this Court expressly stated that it was required to make the statement [17] as a matter of effective administration of jus-

17. The statement in a recent article [Tefft, *United States v. Barnett: "'Twas A Famous Victory",* in *The Supreme Court Review —1964,* 123, at 135.] that under "the new rule of constitutional law, the summary power of the United States courts to punish for criminal contempt would appear to be equated with a prosecution of a minor offense such as an infraction of a traffic regulation", is absurd. Six months' imprisonment for criminal contempt is a far greater sentence than is usually given for violations of the criminal provisions of the anti-trust laws. And to cite one example, the maximum imprisonment for wilful failure to file an income tax return is one year. 18 U. S. C. § 7203. There are countless offenses on the books, for which the maximum imprisonment is not in excess of one year. Furthermore, the failure to testify in a criminal contempt proceeding after one is given immunity is generally a prelude to indictments for the offenses being investigated by the grand jury, for which the witness has been offered immunity.

tice in view of the impending contempt hearing therein. The authoritative quality of the statement, therefore, remains unimpaired.

The test whether initially the power exists to impose a one year sentence for criminal contempt without a jury trial does not turn on whether there has or has not been compliance with the order of the court, or whether the contempt was or was not committed in the presence of the court. If it is constitutional to impose a sentence of more than six months for criminal contempt where there has been no jury trial, it would be constitutional to impose a sentence for as many years as the trial judge desires.

We submit that the reasoning in Footnote 12 in *United States v. Barnett* is constitutionally correct and should not be overturned. Any legal proceeding in which an individual may be imprisoned for more than six months should be treated as a criminal prosecution as contemplated by the Constitution. Any theoretical inconvenience would be far outweighed by an increased respect for law in general and the judiciary in particular. The machinery of justice is best served by faithful observance of constitutional principles, rather than a surrender of those principles on grounds of expediency.

CONCLUSION.

For the reasons given, the judgment against the petitioner should be reversed, and the conviction set aside.

Respectfully submitted,

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APPENDIX.

Constitutional Provisions, Statutes and Rules Involved.

Article III, § 2, Par. 3 provides in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

18 U. S. C. 1 provides:

> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

18 U. S. C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 402 provides:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in the case the accused is a natural person, the sum $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

18 U. S. C. 3691 provides:

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.

Section 203(c) of the Communications Act of 1934, 48 Stat. 1064, 1071, 47 U. S. C. 203(c), provides in pertinent part:

> No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; * * *.

Section 409(l) of the Communications Act of 1934, 48 Stat. 1064, 1097, 47 U. S. C. 409(l), provides in pertinent part:

> No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission * * * or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act * * * on the ground or for the reason that the testimony or evidence * * * required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence * * * except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Section 501 of the Communications Act of 1934, 48 Stat. 1064, 1100, as amended, 68 Stat. 30, 47 U. S. C. 501, provides in pertinent part:

> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done,

or willfully and knowingly cause or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this Act, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year or both; * * *.

Federal Rules of Criminal Procedure involved:

Rule 1 of F. R. Crim. P. provides:

Rule 1. Scope.

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 2 of F. R. Crim. P. provides:

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 7 of F. R. Crim. P. provides:

Rule 7. Indictment and the Information.

(a) Use of Indictment or Information.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * *

Rule 32 of F. R. Crim. P. provides:

Rule 32. Sentence and Judgment.

(a) Sentence.

Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

• • •

Rule 42 of F. R. Crim. P. provides:

Rule 42. Criminal Contempt.

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judges and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is

entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.